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No. 08-681

IN THE
Supreme Court of the United States

JEAN MARC NKEN,
Petitioner,
v.

MICHAEL B. MUKASEY,
ATTORNEY GENERAL OF THE UNITED STATES,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR AMICI CURIAE AMERICAN IMMIGRATION LAWYERS ASSOCIATION, CATHOLIC LEGAL SERVICES, FLORIDA IMMIGRANT ADVOCACY CENTER, HEBREW IMMIGRANT AID SOCIETY, NATIONAL IMMIGRANT JUSTICE CENTER, NATIONAL IMMIGRATION LAW CENTER, PUBLIC COUNSEL, AND WORLD RELIEF SUPPORTING PETITIONER

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MISCELLANEOUS

Aleinikoff, T.A., et al., *Immigration and Citizenship* (6th ed. 2008) 6

American Immigration Law Foundation, *Practice Advisory: How To File A Petition For Review* (Oct. 25, 2006) 26

American Immigration Law Foundation, *Practice Advisory: Return to the United States after Prevailing on a Petition For Review* (Jan. 17, 2007) 29

BIA Practice Manual, *available at* http://www.usdoj.gov/eoir/bia/qapracmanual/BIA_Practice_Man_FullVer.pdf (last visited Dec. 23, 2008) 22, 23, 27

Donnelly, *Africa and Its Children*, Boston Globe, Nov. 21, 2004, at A1 13

Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 Geo. J. Legal Ethics 3 (2008) 24

Morawetz, *INS* v. *St. Cyr: The Campaign to Preserve Court Review and Stop Retroactive Application of Deportation Laws*, in D.A. Martin & P.H. Schuck, *Immigration Stories* 306 (2005) 16

Mushlin, *The Surge in Immigration Appeals and Its Impact on the Second Circuit Court of Appeals*, 60 The Record 243 (2005) 26

TABLE OF AUTHORITIES—Continued

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Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295 (2007) 6, 11

Statistics Division, Office of Judges Program, Administrative Office of the U.S. Courts, *Judicial Business of the United States: 2007 Annual Report of the Director*, *available at* http://www.uscourts.gov/judbus 2007/JudicialBusinespdfversion.pdf (last visited Dec. 23, 2008) 24

United States Court of Appeals for the Ninth Circuit, *Handbook for the Pro Bono Program* (May 5, 2006), *available at* http:// www.ca9.uscourts.gov/ca9/probono.nsf 25

INTEREST OF AMICI CURIAE[1]

Amici are organizations that advocate for the rights of immigrants to fair procedures and fair treatment under U.S. and international law.[2] This case presents an issue that is fundamental to the ability of immigrants to secure meaningful judicial review of orders directing their removal from the United States, perhaps to countries where they will be subjected to persecution, torture, or murder. That issue is whether the decision of a court of appeals to stay an alien's final order of removal pending consideration of the alien's petition for review is governed by the standard set forth in Section 242(f)(2) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1252(f)(2), or instead by the traditional test for stays and preliminary injunctive relief. Amici submit the instant brief to demonstrate that applying § 1252(f)(2) to motions for temporary stays pending judicial review—which only two of the nine circuits to consider the issue have done—would place petitioners who present meritorious challenges to their removal orders at risk of irreparable harm and would be unduly burdensome on both petitioners and courts. Accordingly, the Court should maintain its November 25, 2008 stay of Mr. Nken's final order of removal or, alternatively, should vacate the Fourth Circuit's denial of

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[1] The parties have consented to the filing of this brief. Pursuant to Rule 37.3(a), letters consenting to the filing of this brief are on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person, other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

[2] A list and brief description of each organization are set forth in the appendix to this brief.

Mr. Nken's motion for stay and remand with instructions to reconsider his motion under the traditional stay standard.

SUMMARY OF ARGUMENT

A ruling that 8 U.S.C. § 1252(f)(2) applies to motions for stay of a final order of removal pending a court of appeals' review of a decision of the Board of Immigration Appeals (BIA) would put petitioners with meritorious claims at risk of irreparable injury and would be procedurally burdensome on both petitioners and courts. Applying § 1252(f)(2) to stay motions would allow courts to grant a stay only if there were clear and convincing evidence not only that the BIA erred but that removal would be prohibited as a matter of law. Such a standard would not allow any consideration of equitable factors, even if the court believed that a petitioner were likely to face extreme personal danger or hardship if forced to depart the country prior to the review of his case. Further, applying § 1252(f)(2) to stay motions would create severe procedural difficulties for petitioners by requiring them to make an extremely difficult showing to the court on very tight time constraints, often without any assistance of counsel and without the benefit of a full administrative record for the court to consider.

ARGUMENT

I. PETITIONERS WITH MERITORIOUS CLAIMS WOULD INEVITABLY SUFFER IRREPARABLE HARM IF § 1252(f)(2) WERE APPLIED TO MOTIONS FOR STAY OF FINAL REMOVAL ORDERS

A ruling that 8 U.S.C. § 1252(f)(2) applies to petitioners' motions for stay would be devastating because it would not allow courts to take into account the likeli-

hood that petitioners would suffer irreparable injury if their motions were denied. As numerous past cases demonstrate, the logical, almost mathematically inevitable result of such a ruling—coupled with the heightened requirement that the petitioner show by "clear and convincing evidence" that removal is legally prohibited—would be the removal of petitioners with meritorious challenges to their removal orders while their cases are still pending in the courts, even if such removal would cause them serious harm, and even if the court was likely ultimately to grant relief. As a practical matter, applying § 1252(f)(2) to motions for stay would effectively end many petitions for review before they even begin, with potentially dire consequences.

A. Applying § 1252(f)(2) To Motions For Stay Would Not Allow Courts To Consider The Risk Of Irreparable Harm

When applying the traditional stay standard to motions for stay of a final removal order pending review of a BIA decision, courts have considered the petitioner's chances of success on the merits, the likelihood that the petitioner will suffer irreparable harm if a stay is denied, and other equitable factors.[3] This standard, though flexible, is demanding, and if the petitioner does not make the requisite showing (including the showing of irreparable harm), the court will deny the motion.[4]

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[3] *See, e.g.*, *Tesfamichael* v. *Gonzales*, 411 F.3d 169, 172 (5th Cir. 2005); *Douglas* v. *Ashcroft*, 374 F.3d 230, 233-234 (3d Cir. 2004); *Arevalo* v. *Ashcroft*, 344 F.3d 1, 7-9 (1st Cir. 2003).

[4] *See, e.g.*, *Chambers* v. *Mukasey*, 520 F.3d 445, 451 (5th Cir. 2008) (denying motion for stay of removal under traditional test);

By contrast, if § 1252(f)(2) were applied to motions for stay of a final removal order, it would require that the movant show "by clear and convincing evidence that the entry or execution of [the removal] order is prohibited as a matter of law." Thus, unlike the traditional standard for granting stays and preliminary injunctive relief, § 1252(f)(2) would mandate that courts ignore three of the traditional stay factors, including whether the petitioner could suffer irreparable harm if the stay were denied. The inability to consider the possibility of irreparable injury would make it virtually certain that stays will be denied in meritorious cases and that those petitioners will suffer irreparable harm as a result. For many such petitioners, "irreparable harm" is literally a matter of life and death.

Indeed, under § 1252(f)(2), even if a court of appeals believed that a petitioner were *likely* to prevail on the merits (but not by clear and convincing evidence that the petitioner's removal was prohibited as a matter of law), and were *guaranteed* to suffer irreparable harm if forced to leave the country, the court would still be compelled to deny a stay. As Judge Easterbrook put it:

> [The need for a stay] may remain vital when the alien seeks asylum or contends that he would be subject to torture if returned. The ability to come back to the United States would not be worth much if the alien has been

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Zheng v. *Mukasey*, 507 F.3d 1074, 1076 (7th Cir. 2007) (same); *Lim* v. *Ashcroft*, 375 F.3d 1011, 1012 (10th Cir. 2004) (same); *Andreiu* v. *Ashcroft*, 253 F.3d 477, 483-484 (9th Cir. 2001) (en banc) (same); *see also Mohammed* v. *Reno*, 309 F.3d 95, 102-103 (2d Cir. 2002) (denying stay under traditional standard but delaying mandate to allow petitioner to ask Supreme Court for relief).

> maimed or murdered in the interim. Yet under the Attorney General's reading of § 1252(f)(2) an alien who is likely to prevail in this court, and likely to face serious injury or death if removed, is not entitled to remain in this nation while the court resolves the dispute.

Hor v. *Gonzales*, 400 F.3d 482, 485 (7th Cir. 2005); *see also Tesfamichael* v. *Gonzales*, 411 F.3d 169, 175 (5th Cir. 2005).

Although irreparable harm can befall many categories of aliens who are removed pending review of their cases,[5] the possibility of such injury is particularly grave for those petitioners who have meritorious grounds for asylum, withholding of removal, or protection under the Convention Against Torture. *See, e.g.*, 8 C.F.R. § 1208.13(b) (subject to certain limitations, an alien qualifies as a refugee and can qualify for asylum where "he or she has suffered past persecution or because he or she has a well-founded fear of future persecution"); *id.* § 1208.16(b) (requiring withholding of removal if an alien can establish that "his or her life or freedom would be threatened in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion"); *id.* § 1208.16(c)(2) (requiring withholding of

[5] *See, e.g.*, *Ahmed* v. *Mukasey*, 548 F.3d 768, 2008 WL 4925056 (9th Cir. Nov. 19, 2008) (stay granted May 4, 2004) (stay granted May 28, 2004) (stay granted to petitioner who was applying for adjustment of status based on marriage to a U.S. citizen); *Borges* v. *Gonzales*, 402 F.3d 398, 401, 404 (3d Cir. 2005) (same); *Bejjani* v. *INS*, 271 F.3d 670, 687-689 (6th Cir. 2001) (granting stay under traditional standard to lawful permanent resident), *abrogated in part on other grounds*, *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30 (2006).

removal under the Convention Against Torture if an alien can "establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal"). In such cases, the likelihood of irreparable harm is, in essence, itself the ground on which the alien seeks relief. Moreover, to be eligible for asylum, the applicant need not prove that he *would* be persecuted if returned, but only that he has a *well-founded fear* of such persecution. *See* 8 U.S.C. § 1101(a)(42)(A); *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 423 (1987). The prospect of removal pending judicial review of a likely erroneous denial of asylum is thus particularly troublesome, and many successful petitions for review are in fact asylum cases. *See, e.g.*, Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295, 362 (2007) (in 2004 and 2005, federal courts remanded 650 petitions for review in asylum and related cases rather than affirming the BIA's decision on the merits).

Congress has recognized that it is particularly important that applicants for asylum have the opportunity for meaningful judicial review of removal orders entered against them. Congress has excepted asylum determinations from its general preclusion of judicial review of discretionary decisions taken by the Attorney General under Title II of the Immigration and Nationality Act. *See* 8 U.S.C. § 1252(a)(2)(B); *see also* T.A. Aleinikoff et al., *Immigration and Citizenship* 1152 (6th ed. 2008). If the standard of § 1252(f)(2) were applicable in such cases, many asylum applicants would effectively lose their ability to secure judicial review of their removal orders. Holding asylum applicants who are at risk of irreparable harm to § 1252(f)(2)'s stringent stay standard would therefore undercut Congress's provi-

sion for meaningful judicial review of denials of asylum.[6]

B. A "Clear and Convincing" Evidence Standard Would Make Stays Impossible For Many Petitioners With Strong Cases On The Merits

The danger that petitioners with meritorious claims would be removed while their cases are still in the courts if § 1252(f)(2) were applicable to motions for stay is amplified by that provision's demand for "clear and convincing evidence that the entry or execution of [the removal] order is prohibited as a matter of law." As this Court has stated, the "standard of clear and convincing evidence" lies "between a preponderance of the evidence and proof beyond a reasonable doubt." *Addington* v. *Texas*, 441 U.S. 418, 425 (1979). Several courts have observed that applying § 1252(f)(2) to stay motions would require the petitioner to meet a standard that is not only higher than the traditional stay standard, but also significantly more demanding than the standard that the court will eventually apply on the

[6] Indeed, the dangers that applicants for asylum and withholding of removal could face if they are forced to meet § 1252(f)(2)'s standard has implications not only for the petitioners themselves, but also for the United States' obligations under international law. The premature deportation of petitioners with ultimately meritorious claims could breach this country's commitment to protect refugees under the United Nations Convention Relating to the Status of Refugees, July 5, 1951, 189 U.N.T.S. 150. As this Court has noted, Congress incorporated this international obligation into U.S. law by prohibiting the refoulement of refugees. *See INS* v. *Stevic*, 467 U.S. 407, 426 n.20 (1984) (summarizing legislative history of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102). Under the Fourth and Eleventh Circuits' application of § 1252(f)(2), it would be inevitable that some who in fact merit refugee status would be returned to their persecutors.

merits. *See Tesfamichael*, 411 F.3d at 175; *Arevalo* v. *Ashcroft*, 344 F.3d 1, 8 (1st Cir. 2003); *Mohammed* v. *Reno*, 309 F.3d 95, 100 (2d Cir. 2002); *Andreiu* v. *Ashcroft*, 253 F.3d 477, 482 (9th Cir. 2001) (en banc). In *Arevalo*, Judge Selya also observed that applying § 1252(f)(2) to stay motions "would necessitate full deliberation on the merits of the underlying case." 344 F.3d at 8.

Although the lower courts have not ruled definitively on what types of error might qualify as "clear and convincing evidence that the entry or execution of [the removal] order is prohibited as a matter of law" so as to justify a stay under § 1252(f)(2), Judge Easterbrook has suggested that "[a]s a practical matter," such a stay would be permissible "only when the person is a citizen of the United States or holds a visa of unquestioned validity" or perhaps is "[a] diplomat, or an alien who prevailed before the Board but was threatened by a rogue subordinate who refused to acknowledge the Board's authority." *Hor*, 400 F.3d at 483; *see also Tesfamichael*, 411 F.3d at 173 ("[T]he adoption of the standard urged by the government would render stays of deportation almost impossible to obtain."). *But see Weng* v. *Attorney General*, 287 F.3d 1335, 1340 (11th Cir. 2002) (holding that "aliens who can show clear-cut errors under established law will receive stays" under § 1252(f)(2)).[7] In any event, there is no question that

[7] Although the Eleventh Circuit in *Weng* seemed to allow for the possibility of granting stays to people outside the categories listed by Judge Easterbrook, in practice the court has granted stays at an exceedingly low rate, even for those petitioners who eventually prevailed on the merits. Based on our research, of all reported published and non-published decisions where the Eleventh Circuit eventually *granted* an alien's petition for review in

many aliens with strong claims would face a high, and often insurmountable, burden under § 1252(f)(2)—indeed, the fact that the § 1252(f)(2) standard is so distinct from the petition for review standard is another reason to believe that it was not directed against stays pending a petition for review.

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whole or in part, the circuit denied seven out of eight of those petitioners' motions to stay removal in 2006; eight out of ten in 2007; and four out of five in 2008 (as of December 17). The only stay granted in 2008 in an ultimately successful petition for review was allowed "in light of the government's notice of non-opposition." *Jivan* v. *Attorney General*, No. 07-13379, 2008 U.S. App. LEXIS 20828 (11th Cir. Sept. 19, 2008) (stay granted Feb. 4, 2008).

Indeed, stays were even denied in cases where the Eleventh Circuit eventually found clear errors of law. *See, e.g.*, *Beldorati* v. *Attorney General*, 228 F. App'x 952, 954 (11th Cir. 2007) (per curiam) (stay denied Jan. 9, 2007) (BIA and Immigration Judge (IJ) failed to consider whether petitioner had suffered past persecution); *Saliaj* v. *Attorney General*, 242 F. App'x 642, 644 (11th Cir. 2007) (per curiam) (stay denied Sept. 14, 2006) (same); *see also Toska* v. *Attorney General*, 194 F. App'x 767, 768-770 (11th Cir. 2006) (per curiam), *In re Toska*, No. A77-253-077 *et seq.*, at 2, 4 (EOIR June 9, 2008) (after a stay was denied, granting petition for review after finding that BIA had failed to consider relevant evidence in support of petitioner's claim of past persecution in Albania, eventually resulting in grant of asylum on remand); *Alzate-Zuleta* v. *Attorney General*, 238 F. App'x 472, 475-477 (11th Cir. 2007) (stay denied Oct. 26, 2006) (after stay was denied and petitioner was removed, holding that IJ erred in finding no past persecution where Colombian petitioner had received multiple death threats from the FARC, culminating in attempted murder by FARC gunmen, and the FARC overtly made reference to the petitioner's political activities). In fact, in 2006, the Eleventh Circuit denied a stay in a case where the government itself later moved to remand, effectively conceding that the BIA and IJ had erred. *See Camara* v. *Attorney General*, No. 06-13879 (11th Cir. 2006) (stay denied Sept. 7, 2006; government's motion to remand Nov. 20, 2006).

Applicants for asylum, in particular, would find it very difficult to secure a stay under the § 1252(f)(2) standard, given that they often seek judicial review of a discretionary decision of the Attorney General (as Congress has expressly authorized, *see supra* pp. 6-7), and their challenges often hinge on whether the BIA's order is supported by substantial evidence rather than on clear-cut questions of law. *See* 8 U.S.C. § 1158(b) ("The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who [meets the requirements for refugee status under 8 U.S.C. § 1101(a)(42)(A)]"); *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 162 n.11 (1993) ("A 'refugee' as defined in 8 U.S.C. § 1101(a)(42)(A), is entitled to apply for a discretionary grant of asylum pursuant to 8 U.S.C. § 1158."). Yet it is not at all unusual for the courts of appeals to reverse the BIA's denial of asylum based on serious errors in the administrative proceedings—even if those errors do not amount to mistakes that would likely satisfy the § 1252(f)(2) standard.[8]

Similarly, a petitioner who raised legal issues that were matters of first impression or close questions could likewise be unable to show by "clear and convincing evidence" that removal was prohibited as a matter

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[8] *See, e.g.*, *Yang* v. *Mukasey*, 274 F. App'x 62 (2d Cir. 2008) (BIA failed to provide sufficient analysis of evidence); *Agbor* v. *Gonzales*, 487 F.3d 499 (7th Cir. 2007) (BIA gave insufficient weight to evidence); *Pavlova* v. *INS*, 441 F.3d 82 (2d Cir. 2006) (BIA's adverse credibility determination based on erroneous reading of record); *Ahmadshah* v. *Ashcroft*, 396 F.3d 917 (8th Cir. 2005) (BIA failed to consider key evidence); *Bella* v. *Gonzales*, 157 F. App'x 522 (3d Cir. 2005) (BIA's decision contrary to substantial evidence); *Melkonian* v. *Ashcroft*, 320 F.3d 1061 (9th Cir. 2003) (same).

of law, even if the court believed that the petitioner was likely ultimately to prevail on the merits of his claim. *See Andreiu*, 253 F.3d at 482 (observing that applying § 1252(f)(2) "would effectively require the automatic deportation of large numbers of people with meritorious claims, including every applicant who presented a case of first impression").

Given this heightened standard, if § 1252(f)(2) is applied to stay applications, it is inevitable that petitioners with meritorious challenges—of which there are many—will be denied stays. Judge Posner has observed that the Seventh Circuit had "reversed the Board of Immigration Appeals in whole or part in a staggering 40 percent of the 136 petitions to review … on the merits" over the prior year. *Benslimane* v. *Gonzales*, 430 F.3d 828, 829 (7th Cir. 2005). Although the BIA's reversal rate may vary from circuit to circuit and from year to year, hundreds of meritorious petitions for review make their way to the courts of appeal every year. *See, e.g.*, Ramji-Nogales et al., 60 Stan. L. Rev. at 362. Under § 1252(f)(2)'s standard, it would be much more difficult for these petitioners to secure a stay prior to judicial review of their cases, even where their cases ultimately prove meritorious.[9]

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[9] A holding that § 1252(f)(2) applies to aliens' motions for stays of removal pending review would make it a highly anomalous provision in federal law because it would impose a heightened standard to a request for preliminary (and temporary) relief. The few circumstances in which courts do apply a heightened standard even to motions for a preliminary injunction are inapplicable here, and the differences are instructive. Federal courts generally apply such a heightened standard where (1) the requested injunction would alter the status quo; (2) a mandatory preliminary injunction is sought; or (3) the injunction would award the movant all the re-

C. Numerous Cases Demonstrate The Dangers Of Applying § 1252(f)(2) To Motions For Stay Of Final Removal Orders

The federal reporters are replete with examples of petitioners who successfully contested BIA rulings and who would likely have suffered severe harm had they been forced to leave the country before their petitions for review were adjudicated. This risk would be especially high for petitioners of all sorts whose cases raise difficult or novel legal questions, and for asylum applicants who argue that the BIA ignored the weight of the evidence.

1. Cases raising issues of first impression or close legal questions

Petitioners whose cases raise issues of first impression, or otherwise complex questions of law, would find it especially hard to establish by "clear and convincing evidence" that removal is legally prohibited. Thus, even if such a case appeared legally meritorious and there were a clear risk the petitioner would be in dan-

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lief he ultimately seeks and that relief cannot be undone even if the defendant prevails on trial on the merits. *See, e.g.*, *O Centro Espirita Beneficiente Uniao Do Vegetal* v. *Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004) (en banc), *aff'd*, 546 U.S. 418 (2006); *Tom Doherty Assocs., Inc.* v. *Saban Entm't, Inc.*, 60 F.3d 27, 33-34 (2d Cir. 1995). By contrast, in cases where the government opposes a stay pending review of an alien's challenge of a removal order, (1) it is the *government* that seeks to upset the status quo—*i.e.*, to remove an alien who is currently in the United States; (2) the requested stay would not mandate any actions by the government but rather would simply prohibit them temporarily; and (3) the stay would not grant total relief to the petitioner but only a temporary reprieve pending review, which would be undone if the government prevailed.

ger if removed, a court applying § 1252(f)(2) might still be compelled to deny the stay.

For example, in 2003, Bernard Lukwago, a native of Uganda, argued in his petition for review to the Third Circuit that, as a former child soldier, he would face near-certain death if he were removed to Uganda. *See Lukwago* v. *Ashcroft*, 329 F.3d 157 (3d Cir. 2003). The Third Circuit stayed Lukwago's deportation before ruling for him on the merits. *See id.* (stay granted Aug. 9, 2002). According to the record, Lukwago had been abducted at age fifteen by the Lord's Resistance Army (LRA) after witnessing the murder of his parents; during his four months of captivity, the LRA had forced him to fight government troops, loot the corpses of soldiers, watch the mutilation of civilians and executions of disobedient child soldiers, and participate in the killing of his friend Joseph. *Lukwago*, 329 F.3d at 164. Child soldiers who tried to escape the LRA were executed. *Id.* at 179; *see also, e.g.*, Donnelly, *Africa and Its Children*, Boston Globe, Nov. 21, 2004, at A1 (describing abuse and trauma of twelve-year-old boy abducted by the LRA and the LRA's execution of children who tried to escape). If returned to Uganda, Lukwago feared he would be tracked down and killed by the LRA.

However, before granting Lukwago's petition for review, the Third Circuit first had to determine whether "former child soldiers who have escaped LRA enslavement" could be considered a "particular social group" under 8 C.F.R. § 208.13(b)(1)—a term whose "contours," the court recognized, "are difficult to discern" and to which other courts of appeals had applied "varied … interpretations." *Lukwago*, 329 F.3d at 170-171. The court also had to address whether the substantial weight of the evidence supported a finding of

an objectively reasonable fear of future persecution, contrary to the BIA's ruling. *Id.* at 179-180. It was thus by no means obvious that the BIA had committed a "clear-cut error[] of established law," *Weng*, 287 F.3d at 1340, yet the risk of irreparable harm had Lukwago been forcibly repatriated to Uganda was inarguably high.

The Second Circuit's decision in *Lin* v. *Department of Justice*, 459 F.3d 255 (2d Cir. 2006), further illustrates the danger that petitioners with meritorious claims will not be able to get a stay under § 1252(f)(2) if their case raises close or difficult legal issues. *Lin* involved the case of a man whom the Chinese government had imprisoned for five years under forced labor and reeducation for supporting the Tiananmen Square protests. *Id.* at 259. Lin's case hinged on whether the BIA's interpretation of 8 C.F.R. § 208.6, a confidentiality regulation limiting disclosure of information in asylum applications, was contrary to the plain language of the regulation and did not merit deference under *Auer* v. *Robbins*, 519 U.S. 452 (1997). The court concluded that *Auer* deference was not appropriate and that the BIA had wrongly interpreted § 208.6. *See Lin*, 459 F.3d at 262, 264. But, faced with an agency's interpretation of its own regulation and without any prior determinative ruling by the courts, a circuit applying § 1252(f)(2) to Lin's motion to stay would have been hard-pressed to find by "clear and convincing evidence" that Lin's removal was prohibited as a matter of law. A stay was vital in Lin's case, however, as the Second Circuit concluded that once the Chinese government could infer that Lin was seeking political asylum in the United States, his risk of imprisonment and abuse upon his return to China increased significantly. *Id.* at 268.

Similarly, the Ninth Circuit granted Marta Said Ahmed, an applicant for adjustment of status, a temporary stay before ruling that the BIA erred by giving dispositive weight to the Department of Homeland Security's (DHS) opposition to her motion to reopen. *Ahmed* v. *Mukasey*, 548 F.3d 768, 2008 WL 4925056, at *4 (9th Cir. Nov. 19, 2008) (stay granted May 4, 2004). In so ruling, the court addressed an issue of "first impression" in the circuit that had already split three other courts of appeals: whether DHS has the authority "to block unilaterally a motion to reopen." *Id.* at *3. Ahmed would thus likely not have received a stay under § 1252(f)(2) even though her marriage was bona fide (her I-130 petition had been granted), her son was still an infant, and her petition was ultimately successful. *See id.* at *2, 5.[10]

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[10] The Third Circuit case of Jose Borges also turned on a question of "first impression" in that circuit: whether the 180-day time limit for moving to reopen a removal order issued in absentia is subject to equitable tolling. *See Borges* v. *Gonzales*, 402 F.3d 398, 400 (3d Cir. 2005). Borges—who was under removal proceedings for overstaying a visa and had applied for adjustment of status—suffered from egregiously inadequate representation, which resulted in DHS seizing and detaining Borges for more than a year, even though he had married a U.S. citizen six years earlier and was eligible for relief. *Id.* at 401-403, 409. The Third Circuit issued Borges a stay of removal and eventually granted his petition for review, encouraging DHS to release him during the pendency of his proceedings. *Id.* at 404, 409. As unfortunate as Borges' case was, it would have been even more so had the Third Circuit been required to apply § 1252(f)(2) to his motion to stay his final removal order: the court likely could not have determined there was clear and convincing evidence that the order was prohibited as a matter of law where the matter was one of first impression; Borges' detention made his deportation imminent; and once he was deported, he would no longer have been able to pursue an adjust-

Finally, in *INS* v. *St. Cyr*, 533 U.S. 289 (2001), this Court decided a legal issue on which there had been substantial difference of opinion: whether the repeal of relief under former Section 212(c) of the INA, 8 U.S.C. § 1182(c), applied retroactively, so as to render St. Cyr ineligible for a waiver of deportation that previously would have been available to him. Had St. Cyr, a lawful permanent resident, not been granted a stay pending judicial review of his case, he would have been removed to Haiti, which routinely imprisons deportees with any criminal record in horrific conditions. *See, e.g.*, *Pierre* v. *Attorney General*, 528 F.3d 180 (3d Cir. 2008) (recognizing inhumane conditions in Haitian prisons); *Auguste* v. *Ridge*, 395 F.3d 123, 129 (3d Cir. 2005) (describing temperatures of 105 degrees, and other "slave ship" like conditions). After prevailing in the Supreme Court, St. Cyr also prevailed on remand. *See* Morawetz, *INS* v. *St. Cyr: The Campaign to Preserve Court Review and Stop Retroactive Application of Deportation Laws*, in D.A. Martin & P.H. Schuck, *Immigration Stories* 306 (2005). But it is highly unlikely that St. Cyr could have obtained a stay of removal under the § 1252(f)(2) standard, given the division of authority on the legal question in the lower courts and the then-

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ment of status based on his marriage, *Ceta* v. *Mukasey*, 535 F.3d 639, 646 (7th Cir. 2008). *See also Morales-Morales* v. *Ashcroft*, 384 F.3d 418, 421-423, 428 (7th Cir. 2004) (stay granted Nov. 13, 2003) (after granting stay and deciding jurisdictional issue of first impression in the circuit, remanding for reconsideration of Morales' eligibility for cancellation of removal, where she had entered the United States eighteen years earlier, was married to a lawful permanent resident, and had four young children who were U.S. citizens, and the IJ himself had stated that "'the respondent in this case will most likely be able to meet the exceptional and extremely unusual hardship factors' for cancellation of removal").

absence of any controlling decision in this Court on that question.

Moreover, as explained below, it is exceptionally difficult for petitioners who are removed to pursue their cases in the courts. Thus, application of § 1252(f)(2) to stays pending judicial review could not only work serious harm to petitioners with meritorious claims but could also prevent this Court and the courts of appeals from clarifying important principles of immigration law.

2. Cases alleging inadequate consideration of the evidence

In addition, asylum petitioners who argue that the BIA did not give adequate consideration to evidence of persecution would find it extremely difficult to show by "clear and convincing evidence" at the preliminary stay stage that removal is barred as a matter of law.

The case of Ahmad Ahmadshah, an Afghani Christian who feared execution for apostasy, a capital crime under Shari'a law, illustrates this problem. *See Ahmadshah* v. *Ashcroft*, 396 F.3d 917, 919 (8th Cir. 2005). Ahmadshah had been beaten and threatened when local militiamen found a Bible inscribed with the names of him and his sister; they killed his sister two days later. *Id.* The Eighth Circuit stayed Ahmadshah's deportation and later granted his petition for review, remanding to the agency because the Immigration Judge (IJ) and BIA had not considered Ahmadshah's evidence that apostates are still subject to the death penalty in Afghanistan. *Id.* at 921; *see also id.* (stay granted Mar. 3, 2004). Again, the risks of irreparable harm were high—they could be no higher—and again, the Eighth Circuit's disapproval of the agency's failure to adequately consider material evidence in the

record would likely not have constituted the "clear and convincing evidence" that removal was prohibited under § 1252(f)(2).[11]

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[11] *See also, e.g.*, *Bella* v. *Gonzales*, 157 F. App'x 522, 523 (3d Cir. 2005) (stay granted Dec. 22, 2004) (granting stay and granting petition for review by Liberian who opposed Charles Taylor's ruling regime, had been tortured for his political views, and whose uncle, brother, and two cousins had all been murdered by Taylor's government, before ruling on the merits that substantial evidence did not support IJ's denial of asylum); *Mulanga* v. *Ashcroft*, 349 F.3d 123, 126-127, 131 (3d Cir. 2003) (stay granted Sept. 17, 2002) (granting stay and granting petition for review where the IJ's decision was not supported by substantial evidence; evidence instead suggested past persecution and well-founded fear of future persecution where Mulanga had been detained and beaten by authorities searching for her husband, a political activist who had disappeared and was presumably dead, and where current reports indicated violent retaliation against those affiliated with the opposition); *Mekhael* v. *Mukasey*, 509 F.3d 326, 327-328 (7th Cir. 2007) (stay granted Sept. 25, 2007) (granting stay and vacating BIA order where BIA did not adequately consider evidence of changed conditions—the war between Israel and Hezbollah—submitted by Lebanese Christian who had served in military group supported by Israel); *Gebreeyesus* v. *Gonzales*, 482 F.3d 952, 956 (7th Cir. 2007) (stay granted May 24, 2006) (granting stay and remanding for reconsideration of motion to reopen in light of new evidence, even though that evidence was not clear-cut, where Ethiopian who had been imprisoned for political activities and had continued political work in the United States had recently learned that her family's house in Ethiopia was under surveillance and that her brother had been arrested); *Diallo* v. *Gonzales*, 175 F. App'x 74, 76 (7th Cir. 2006) (stay granted Mar. 10, 2005) (granting stay and granting petition for review where BIA did not adequately consider evidence suggesting imminent violence against members of the political opposition like Diallo, who had already been imprisoned, raped, and beaten with an electrical cord for her political activities); *Melkonian* v. *Ashcroft*, 320 F.3d 1061, 1072 (9th Cir. 2003) (stay granted Oct. 19, 2001) (granting stay and remanding to BIA because substantial evidence showed that Armenian Christian from

Aliens who are escaping from China's policy of forced sterilization would face a similar risk under § 1252(f)(2), as premature deportation could result in irreparable injury to both men and women who have had multiple children. In many of those cases in which it has granted a stay of a removal order and remanded to the BIA, the Second Circuit has strongly criticized the agency's inadequate consideration of the evidence without finding outright that removing the petitioner from the country would be prohibited as a matter of law. *See, e.g.*, *Liu* v. *Mukasey*, 276 F. App'x 93 (2d Cir. 2008) (remanding motion to reopen where BIA ignored documents suggesting Liu's wife would be sterilized and the entire family detained upon return); *Yang* v. *Mukasey*, 274 F. App'x 62 (2d Cir. 2008) (remanding motion to reopen where BIA did not provide sufficient analysis of affidavit of Yang's father, which stated officials knew Yang had two U.S.-born children and planned to sterilize him once he returned to China); *Lui* v. *BIA*, 237 F. App'x 647 (2d Cir. 2007) (remanding motion to reopen where BIA did not comment on letter from town committee acknowledging Lui's four children and stating he would be sterilized upon return). In cases like these, a stay under § 1252(f)(2) would have been unlikely regardless of how blatant the BIA's failure to consider key evidence because the court of appeals did not explicitly find that consideration of that

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Abkhazia had objectively reasonable fear of future persecution based on his religion, ethnicity, and pro-Georgian political views); *Pavlova* v. *INS*, 441 F.3d 82, 84 (2d Cir. 2006) (granting petition by Russian Baptist who had been beaten and raped by Russian nationalists who had also killed four of her religious brethren, and vacating BIA order because BIA had based its adverse credibility determination on an erroneous reading of the record).

evidence would have forced the conclusion that removal of the petitioner would be prohibited as a matter of law. Indeed, since it began applying § 1252(f)(2) to motions for stay of removal, the Eleventh Circuit has repeatedly denied stays to petitioners who had applied for asylum based on China's forced sterilization policy, even in cases where it eventually granted the petitions for review because the BIA had abused its discretion by failing to consider material evidence. *See, e.g.*, *Li* v. *Attorney General*, 488 F.3d 1371, 1377 (11th Cir. 2007) (stay denied Oct. 20, 2006); *Cuiyan Zhu* v. *Attorney General*, 170 F. App'x 613, 617 (11th Cir. 2006) (stay denied June 28, 2005); *Shao Yu Yuan* v. *Attorney General*, No. 07-15781, 2008 WL 4164824, at *4 (11th Cir. Sept. 11, 2008) (per curiam) (stay denied Feb. 12, 2008).

Under § 1252(f)(2), stays of removal for women fearing that they or their daughters will be forced to suffer female genital mutilation (FGM) if deported would also be at risk. FGM is a "horrifically brutal procedure" that can lead to serious infection, hemorrhage, infertility, stillbirths, and death. *Nwaokolo* v. *INS*, 314 F.3d 303, 308-309 (7th Cir. 2002) (per curiam). In *Nwaokolo*, the Seventh Circuit granted a stay of deportation because of the "obvious[ly] "sever[e]" risk of irreparable harm (genital mutilation) to Nwaokolo and her two daughters if they were returned to Nigeria and because it was "arguable" that the BIA had abused its discretion by giving inadequate weight to Nwaokolo's evidence. *Id.* at 308, 310. Had the court been precluded from considering the likelihood of irreparable injury to

the petitioner, it likely would likely not have been able to grant a stay under § 1252(f)(2).[12]

II. APPLYING § 1252(f)(2) TO MOTIONS FOR STAY OF FINAL REMOVAL ORDERS WOULD ESCALATE THE PROCEDURAL DIFFICULTIES PETITIONERS FACE

As the First Circuit has observed, applying § 1252(f)(2) to stays of deportation would effectively require a petitioner to persuade the court of appeals, at a very preliminary stage, that he will prevail at the end of the case, and to do so under an even higher standard than that applied to the merits. *See Arevalo*, 344 F.3d at 8. The difficulty of making such a showing is considerably enhanced by several procedural obstacles that petitioners face when challenging a removal order, including the need to move for a stay early in the process of judicial review, the lack of legal representation for many petitioners at that stage of the case, and the absence of access to a full administrative record. Although petitioners would face these obstacles under any standard, the application of § 1252(f)(2)'s standard would make them considerably more arduous.

Further, if a stay is denied in a meritorious case and the alien is removed, it is exceedingly difficult for

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[12] Similarly, in *Agbor* v. *Gonzales*, 487 F.3d 499 (7th Cir. 2007) (stay granted Apr. 28, 2006), the Seventh Circuit granted a stay of deportation before granting Irene Arrey Agbor's petition for review. Agbor had fled Cameroon with her husband after her mother repeatedly threatened to poison her if she did not undergo FGM, and she feared either death or forced mutilation should she be repatriated. *Id.* at 501, 505. The Seventh Circuit found that the BIA's decision was "not supported by substantial evidence," *id.* at 504, grounds that might not have allowed Agbor to secure a stay if § 1252(f)(2)'s standard had been applied.

the alien to return to this country even if he eventually succeeds in overturning the BIA's decision from abroad. Given the absence of any formal mechanism for allowing successful petitioners back into the United States after prevailing against an unlawful removal order, applying the § 1252(f)(2) standard would be clearly contrary to Congress's intent that petitioners with meritorious challenges to their removal order have meaningful judicial review.

A. Because A Petitioner May Be Removed At Any Time, There Is Often Little Advance Warning Before A Stay Must Be Sought

An alien under a final order of removal can face severe time constraints in any effort to seek judicial review of the agency's decision. Under 8 U.S.C. § 1252(b)(3)(B)—and in contrast to prior law—an order of removal is not automatically stayed when an alien files a petition for review with the appropriate United States Court of Appeals. Rather, if an alien does not move for and receive a stay of removal, he is "subject to removal at any time after the entry of the removal order." *Patel* v. *Ashcroft*, 378 F.3d 610, 611 (7th Cir. 2004); *see also Weng*, 287 F.3d at 1337.

The rules governing BIA proceedings do not include a provision comparable to Fed. R. Civ. P. 62(a), under which, in most cases, execution of a judgment of a U.S. district court is automatically stayed for ten days following the entry of the court's order. Rather, under the INA, if an alien appeals an IJ's order of removal to the BIA, that order becomes final—and immediately executable—when the BIA affirms it. *See* 8 U.S.C. § 1101(a)(47)(B)(i); 8 C.F.R. § 1003.1(f); *Obale* v. *Attorney General*, 453 F.3d 151, 160 (3d Cir. 2006); BIA Practice Manual § 1.4(d), *available at* http://www.usdoj.

gov/eoir/bia/qapracmanual/BIA_Practice_Man_FullVer.pdf (last visited Dec. 23, 2008) ("An order [of the BIA] is deemed effective as of its issuance date, unless the order provides otherwise.").

Nor does the BIA itself normally have the authority to stay the execution of a removal order after it has affirmed such an order. Although an IJ's order of removal is stayed pending appeal to the BIA, 8 C.F.R. § 1003.6, and the BIA may stay removal orders when a motion to reopen or reconsider is pending before it, *id.* §§ 1003.2(f), 1003.23(b)(1)(v), there is no general authority for the BIA to stay administratively its own final orders pending judicial review in federal courts. *See* BIA Practice Manual § 6.3(a) ("The Board entertains stays only when an appeal, a motion to reopen, or a motion to reconsider is pending before the Board."); *id.* § 6.3(e) ("A discretionary stay of removal, deportation, or exclusion expires when the Board renders a final decision in the case."); *Alimi* v. *Ashcroft*, 391 F.3d 888, 893 (7th Cir. 2004) ("BIA does not entertain applications for stay" pending judicial review).

Because of the immediacy of the risk of removal, petitioners must often request a stay from the court of appeals at an early point in the process, sometimes even immediately upon filing the federal appeal. Requiring a petitioner to prove by "clear and convincing evidence" that his removal is legally prohibited under § 1252(f)(2) would make such efforts even more difficult.

B. Many Aliens Must Seek A Stay Of Removal Without The Assistance Of Counsel

The difficulties petitioners would face in securing a stay under § 1252(f)(2) are compounded by the fact that they often have no attorney representing them in the

preliminary stages of judicial review—in part because many lawyers who appear before immigration judges and the BIA do not practice in the courts of appeals. Applying the § 1252(f)(2) standard to stay motions would thus require aliens to carry the heaviest burden when they are least likely to have the assistance of counsel.[13]

Sixty-five percent of aliens whose administrative proceedings were completed in 2005 were unrepresented. *See* Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 Geo. J. Legal Ethics 3, 20 (2008). Of those who petition for review in the courts of appeals, a significant number continue pro se. In 2007, the petitioners in approximately twenty-six percent of all appeals from administrative agencies to the federal appellate courts were pro se at filing, and almost all of those pro se filings were appeals from the BIA. *See* Statistics Division, Office of Judges Program, Administrative Office of the U.S. Courts, *Judicial Business of the United States: 2007 Annual Report of the Director* 131 tbl. B-9, *available at* http://www.uscourts.gov/judbus2007/JudicialBusinespdfversion.pdf (last visited Dec. 23, 2008).[14]

Further, even where there are programs to link potentially meritorious pro se petitioners to counsel—for

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[13] The lack of legal representation for petitioners, many of whom have little knowledge of the legal system, have limited English skills, and may be detained, also precludes any negotiations with the government over delaying execution of a removal order until after the court of appeals has ruled on the petitioner's stay motion or on the merits.

[14] Eighty-nine percent of administrative appeals came from the BIA. *Id.* at 98 tbl. B-3.

example under the Ninth Circuit's Pro Bono Program—the process of matching attorneys to these cases is time-consuming, and delay between the date of the agency's final order and appointment of counsel is virtually inevitable.[15] While the courts of appeals may appoint counsel in certain pro se cases, they usually will not do so at the preliminary stage when the petitioner would normally have to file a motion to stay removal. *See, e.g.*, *Obasohan* v. *Attorney General*, 479 F.3d 785 (11th Cir. 2007) (court appointed counsel to represent petitioner more than two months after his pro se motion to stay removal was denied; petitioner prevailed on the merits). Thus, in light of the time constraints facing an alien subject to a final order of removal, even a petitioner who may eventually secure counsel for the merits briefing of a petition for review may have to seek a stay without any representation.

In practice, this lack of representation, coupled with the speed at which a petitioner must seek a stay and other procedural hurdles, would likely render § 1252(f)(2)'s standard unworkable, or at least highly prejudicial to petitioners. It is too much to expect a pro se litigant facing such time pressure to prepare what is essentially a merits briefing with a heightened standard of proof on his own.

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[15] *See, e.g.*, United States Court of Appeals for the Ninth Circuit, *Handbook for the Pro Bono Program* 2-4 (May 5, 2006), *available at* http://www.ca9.uscourts.gov/ca9/probono.nsf (describing the screening process before pro bono counsel is appointed for pro se appellants and petitioners).

C. The Challenge Of Presenting A Case At The Preliminary Stay Stage Is Enhanced By The Lack Of An Administrative Record

The lack of an available administrative record at the preliminary stage where a petitioner must normally move for a stay would further prejudice petitioners who must satisfy § 1252(f)(2)'s standard. It would also frustrate courts' ability to evaluate motions under that standard.

Under Rule 17(a) of the Federal Rules of Appellate Procedure, the government has forty days after being served with an alien's petition for review to file the administrative record with the circuit clerk. In practice, the BIA often takes even longer to file the record. *See, e.g.*, Mushlin, *The Surge in Immigration Appeals and Its Impact on the Second Circuit Court of Appeals*, 60 The Record 243, 250 n.23 (2005) (observing that in the Second Circuit, "it … can take months to receive the administrative record"); *see also* American Immigration Law Foundation, *Practice Advisory: How To File A Petition For Review* 10 (Oct. 25, 2006) (reviewing problems that arise when an agency files the administrative record late).[16]

Since an alien subject to a final order of removal may normally be removed at any time following the BIA's decision, this delay of forty days or more is potentially fatal to any attempt to prove by "clear and convincing evidence" that removal is prohibited as a

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[16] Indeed, in the present case, this Court did not receive the record from the Fourth Circuit until ten days *after* granting Mr. Nken a stay. *See* Docket, *Nken* v. *Mukasey*, No. 08-681 (Nov. 25, 2008 order granting stay; Dec. 5, 2008 entry indicating record received).

matter of law. Although BIA rules permit a party to a proceeding to review the record on file with the Board, the party may not remove documents, and copying is limited. *See* BIA Practice Manual § 1.5(d)(i), (iii). Moreover, the Board's only office is in Virginia, and it is therefore impracticable for most petitioners (especially those who are detained) to travel there to review their case file. Even for those who can, the BIA typically does not keep files on-location once it has decided a case; rather, it sends them to an offsite storage facility. In addition, the BIA's Practice Manual instructs parties who seek to copy more than twenty-five pages of the record to consult the agency's Freedom of Information Act Unit, which effectively guarantees further delays. *Id.*

Petitioners' limited access to the administrative record is problematic under any standard,[17] but because the § 1252(f)(2) standard would require a stringent analysis of the merits of the underlying claim and does not account for equitable factors that may be more easily demonstrated without the benefit of a full record, the absence of a record will make it virtually impossible for many petitioners to obtain a stay of their removal orders. *See Andreiu*, 253 F.3d at 482 ("[Applying § 1252(f)(2)] would require full scale briefing at the beginning of the appellate process, often before the petitioner has even received a copy of the administrative record."); *see also Li* v. *Attorney General*, 488 F.3d 1371 (11th Cir. 2007) (certified administrative record filed a month after petitioner moved to stay removal and two

[17] *See, e.g.*, *Lim* v. *Ashcroft*, 375 F.3d 1011, 1012 (10th Cir. 2004) ("Obviously, whenever possible, the petitioner [seeking a stay of removal] should file the administrative record, or relevant portions of it, to support any factual assertions.").

weeks after court denied petitioner's motion to stay under § 1252(f)(2)). In particular, absent a full record, it would be extremely difficult for courts to properly evaluate stay motions under § 1252(f)(2) in cases where the petitioner argues that the IJ or BIA did not properly consider the record evidence. *See, e.g.*, *Agbor* v. *Gonzales*, 487 F.3d 499, 502-505 (7th Cir. 2007); *Yang*, 274 F. App'x at 63-64.[18]

D. Pursuing A Petition For Review Is Extremely Difficult Once A Removal Order Has Been Executed

Applying § 1252(f)(2) to motions for stay of removal orders would dramatically increase the number of petitioners who are removed pending review of their cases in the courts of appeals, many of whom would be unable to return to the United States even if they successfully contest their removal orders. Although courts of appeals have jurisdiction to review removal orders even after petitioners have been removed from the country,[19] in practice it is extremely difficult for an alien to return once he has been deported, even if his petition for review has been successful. There is no class of visa

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[18] In some cases, even when the administrative record arrives, it may be too limited to permit the kind of searching review the § 1252(f)(2) standard would demand. *See Arevalo*, 344 F.3d at 8 n.5 ("The anomaly [of the clear and convincing evidence standard] is magnified when one considers the barebones administrative record from which appellate judges must work in deportation cases.").

[19] *See, e.g.*, *Zazueta-Carrillo* v. *Ashcroft*, 322 F.3d 1166, 1171 (9th Cir. 2003) (observing that, since the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, "[w]e now may entertain a petition after the alien has departed"); *see also* IIRIRA, Pub L. No. 104-208, § 306(b), 110 Stat. 3009-612 (repealing 8 U.S.C. § 1105a(c) (1994)).

or other formal reentry mechanism available to aliens who have been previously removed but have successfully challenged their removal orders. *See, e.g.*, American Immigration Law Foundation, *Practice Advisory: Return to the United States after Prevailing on a Petition For Review* 1 (Jan. 17, 2007). As a result, trying to obtain travel documentation that will permit a returning alien to reenter the United States can be onerous, extraordinarily time-consuming, and often entirely improvisatory. Furthermore, the cost associated with return travel and documentation (including the nearly indispensable assistance of counsel in such a difficult endeavor) may be so burdensome that it effectively precludes the petitioner from returning at all. *See id.* at 4. Thus, even an alien who wins his or her case may still be kept out of the country.

The extraordinary difficulty of returning successful petitioners back into the United States once they have been removed underscores the importance of allowing petitioners with potentially meritorious cases to obtain judicial review of their cases before they are forced to leave. This need is especially significant for petitioners who face serious hardships or danger if they are removed, even temporarily, to their countries of origin. For such people, the denial of a stay motion effectively denies them the opportunity for meaningful judicial review altogether.

CONCLUSION

The Court should maintain its November 25, 2008 stay of Mr. Nken's final order of removal or, alternatively, should vacate the Fourth Circuit's denial of Mr. Nken's motion for stay and remand with instructions to reconsider his motion under the traditional stay standard.

Respectfully submitted.

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APPENDIX

LIST OF AMICI CURIAE

The American Immigration Lawyers Association (AILA) is a national association with approximately 11,000 members throughout the United States, Canada, and Europe, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters.

Catholic Legal Services, Archdiocese of Miami, Inc. (CLS) is a non-profit agency dedicated to serving the immigration needs of South Florida's immigrant and refugee communities. CLS is a nationally recognized, BIA-accredited organization providing professional immigration services and attorney representation before the various governmental agencies including the Department of Homeland Security, the Immigration Courts, and the Board of Immigration Appeals. Over 1000 individuals seek the services of CLS each month: individuals seeking to reunite with their families; political and religious refugees seeking safety and security; essential religious workers seeking to minister to U.S. religious communities; battered spouses and their children. Catholic Legal Services attempts to meet their needs with a staff of nine full-time lawyers and thirty experienced immigration professionals, serving four locations in Miami-Dade and Broward counties, as well as the two major regional detention facilities.

The Florida Immigrant Advocacy Center (FIAC), a non-profit law firm, was founded in 1996 when federal

funding restrictions limited Legal Services' ability to handle immigration cases on behalf of indigent clients. FIAC's mission is to protect and promote the basic human rights of immigrants of all nationalities. FIAC serves the most vulnerable immigrant populations through direct services, federal court litigation, impact advocacy, and education. For more than twelve years, FIAC attorneys have represented individual clients in removal proceedings before immigration judges, the Board of Immigration Appeals, and the U.S. Court of Appeals for the Eleventh Circuit.

Since its founding in 1881, the central mission of the Hebrew Immigrant Aid Society (HIAS) has been to rescue Jews and others fleeing persecution and to assist them to start their lives anew in peace and security in the United States and elsewhere. In fulfillment of this mission, HIAS maintained staff at Ellis Island to assist individuals through the immigration process, including representation in exclusion proceedings. More recently, HIAS attorneys and accredited representatives have provided legal representation to asylum seekers in Immigration Courts in the New York area, including at immigration detention facilities. HIAS has successfully represented numerous asylum seekers throughout the appellate process, up to and including the Federal Courts of Appeal. Through this experience we have learned how difficult it can be for asylum seekers to present sufficient evidence for their claims to be adjudicated, and how often it is necessary to go through several levels of review before all evidence is presented and considered and a just decision is reached. Therefore, HIAS believes it is crucial that individuals fleeing persecution have the opportunity for full judicial review of their cases, including when necessary the abil-

ity to move for their cases to be reopened for further review when the evidence and circumstances warrant.

The National Immigrant Justice Center (NIJC), a program of the Heartland Alliance for Human Needs and Human Rights, is a non-profit organization accredited by the Board of Immigration Appeals to provide immigration assistance since 1980. NIJC promotes human rights and access to justice for immigrants, refugees, and asylum seekers through legal services, policy reform, impact litigation, and public education. NIJC provides legal education and representation to low-income immigrants, asylum seekers, and refugees, including survivors of domestic violence and victims of crimes, detained immigrant adults and children, and victims of human trafficking, as well as immigrant families and other non-citizens facing removal and family separation. In fiscal year 2008, NIJC provided legal services to more than 8,000 non-citizens. NIJC has three offices in metropolitan Chicago and a staff that includes licensed attorneys, BIA-accredited representatives and paralegals, as well as the support of over 1000 pro bono attorneys, making NIJC one of the most accessible, high-quality legal service providers in the United States.

The National Immigration Law Center (NILC) is a non-profit legal advocacy organization dedicated to advancing and promoting the rights of low-income immigrants and their family members. NILC conducts trainings, produces legal publications, and provides technical assistance to non-profit legal assistance organizations across the country concerning immigrants' rights. NILC also conducts litigation to promote the rights of low-income immigrants in the areas of immigration law, employment, and public benefits. A major concern of the organization is to ensure that the gov-

ernment treats immigrants with fairness and due process. NILC has a direct interest in the issues in this case.

Public Counsel is the largest pro bono public interest law firm in the world. Founded in 1970, it is dedicated to advancing equal justice under law by delivering free legal and social services to the most vulnerable members of our community, including abused and abandoned children, homeless families and veterans, senior citizens, victims of consumer fraud, and non-profit organizations serving low-income communities. Public Counsel's Immigrants' Rights project represents over 100 asylum seekers each year. In the last fifteen years, a significant number of its clients have successfully appealed decisions denying them asylum to the U.S. Court of Appeals for the Ninth Circuit.

World Relief is an international non-profit organization whose mission is to empower the local Church to serve the most vulnerable. In the United States, World Relief focuses on serving refugees, asylum seekers, asylees, victims of human trafficking, and other vulnerable immigrants. World Relief has over twenty offices in the United States that provide immigration legal services and whose staff include numerous attorneys and individuals accredited by the Board of Immigration Appeals. World Relief is active both in individual case representation and the development of sound refugee and immigration laws and policies.